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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE,

Plaintiff and Respondent,

v.

MYRNA L. ESCOBAR,

Defendant and Appellant.

B206139

(Los Angeles County
Super. Ct. No. NA076184)

APPEAL from a judgment of the Superior Court of Los Angeles County, Gary J. Ferrari, Judge. Reversed and remanded with directions.

James M. Crawford, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Paul M. Roadarmel, Jr., Supervising Deputy Attorney General, Eric J. Kohm, Deputy Attorney General, for Plaintiff and Respondent.

INTRODUCTION

A jury convicted defendant and appellant Myrna L. Escobar (defendant) of four counts of grand theft of personal property (Pen. Code, §§ 484, subd. (a) & 487, subd. (a)¹) and one count of petty theft (§§ 484, subd. (a) & 488). The trial court sentenced defendant to three years in state prison.

On appeal, defendant contends that the trial court erred when it summarily denied her *Marsden*² motion to appoint new defense counsel without permitting her to state the reasons she requested new representation and that such error is prejudicial per se. We hold that the trial court erred in failing to allow defendant to state the reasons she requested new representation and remand with directions to the trial court to conduct a *Marsden* hearing as set forth below.

DISCUSSION

A. Factual Background

Defendant's convictions are based on a series of residential thefts of jewelry and money.³ On January 16, 2008, the trial court asked defendant if she wanted to accept the trial court's offer of 16 months, stating that if she did not accept the offer, it would send her case to another department for assignment to a trial court. The trial court "guaranteed" defendant that she would receive a sentence greater than 16 months if she were convicted. Defendant stated to the trial court, "I have made a decision today that I do not want this attorney to represent me any longer because up until now he has done nothing for me." The trial court responded, "All right. And that motion is denied. [¶] Now, what are we going to do?" Defendant responded, "Trial."

¹ All statutory citations are to the Penal Code unless otherwise noted.

² *People v. Marsden* (1970) 2 Cal.3d 118.

³ We omit a recitation of the facts underlying defendant's convictions as they do not bear on defendant's *Marsden* motion.

Moments later, defendant asked the trial court, “Why did you tell me – why don’t you tell me that you’re denying my request for new attorney?” The trial court responded, “I did, I denied it. That’s a decision that I get to make.”

B. Application of Relevant Legal Principles

“A defendant ‘may be entitled to an order substituting appointed counsel if he shows that, in its absence, his Sixth Amendment right to the assistance of counsel would be denied or substantially impaired.’ (*People v. Berryman* (1993) 6 Cal.4th [1048,] 1070, 25 Cal.Rptr.2d 867, 864 P.2d 40, citing *Marsden, supra*, 2 Cal.3d 118.) The law governing a *Marsden* motion ‘is well settled. “When a defendant seeks to discharge his appointed counsel and substitute another attorney, and asserts inadequate representation, the trial court must permit the defendant to explain the basis of his contention and to relate specific instances of the attorney’s inadequate performance. [Citation.] A defendant is entitled to relief if the record clearly shows that the first appointed attorney is not providing adequate representation [citation] or that defendant and counsel have become embroiled in such an irreconcilable conflict that ineffective representation is likely to result [citations].” [Citations.]’ (*People v. Fierro* (1991) 1 Cal.4th 173, 204 [3 Cal.Rptr.2d 426, 821 P.2d 1302].)” (*People v. Memro* (1995) 11 Cal.4th 786, 857.)

Defendant’s statement to the trial court that she no longer wanted her present attorney to represent her because the attorney had not done anything for her adequately stated a motion under *People v. Marsden, supra* 2 Cal.3d 118. The trial court was then obligated to permit defendant to state the basis for her claim that her attorney’s representation was inadequate or that she and her attorney were embroiled in an irreconcilable conflict and to state specific instances of that inadequate performance or conflict. (*People v. Memro, supra*, 11 Cal.4th at p. 857; *People v. Lucky* (1988) 45 Cal.3d 259, 281 [“a trial court’s duty to permit a defendant to state his reasons for dissatisfaction with his attorney arises when the defendant in some manner moves to discharge his current counsel”].) The trial court’s failure in this regard was error.

(*People v. Marsden*, *supra*, 2 Cal.3d at p. 126; *People v. Lewis* (1978) 20 Cal.3d 496, 498-499.)

Apparently conceding that defendant's statement to the trial court adequately stated a *Marsden* motion, respondent argues that "a defendant who makes a timely *Marsden* motion may, by his postmotion conduct, abandon his request for a *Marsden* hearing." Respondent argues that defendant "waived or abandoned" her request for the appointment of new defense counsel because she "never took the opportunity to identify a single substantive reason, or evidence in support thereof, as a basis for her unsupported and fleeting request for the appointment of new counsel. It appears the request was made in a moment of anger or desperation in connection with the plea bargaining. Additionally, appellant never made another request or attempt to explain the grounds for such a request. . . . She, instead, acquiesced and accepted the services of her appointed counsel, not only through trial, but also at a restitution hearing following trial."

In support of this argument, respondent relies on *People v. Vera* (2004) 122 Cal.App.4th 970 and two cases cited therein, *People v. Kenner* (1990) 223 Cal.App.3d 56 and *People v. Skaggs* (1996) 44 Cal.App.4th 1. These cases have no application in this case because, as respondent admits, they are not factually analogous to this case. In *People v. Vera*, after the defendant stated a number of perceived deficiencies in his defense counsel's performance in support of his *Marsden* motion, the trial court denied the motion. (*People v. Vera*, *supra*, 122 Cal.App.4th at p. 976.) The defendant stated that he was not finished listing defense counsel's deficiencies. (*Ibid.*) The trial court responded that it was denying the *Marsden* motion without prejudice, explaining that the defendant could renew the motion. (*Ibid.*) The defendant failed to renew his *Marsden* motion, and Court of Appeal held that the defendant's failure to take advantage of the trial court's offer for a later hearing abandoned the defendant's unstated complaints. (*Id.* at pp. 981-982.) In this case, unlike in *People v. Vera*, the trial court summarily denied defendant's *Marsden* motion without giving defendant any opportunity to explain why she was dissatisfied with defense counsel's representation or offering defendant a later hearing.

In *People v. Kenner*, *supra*, 223 Cal.App.3d at page 58, the defendant moved to represent himself under *Faretta v. California* (1975) 422 U.S. 806. The matter was set for a hearing. (*People v. Kenner*, *supra*, 223 Cal.App.3d at p. 59.) Later, defense counsel requested the trial court to “reserve” the *Faretta* motion until a later date. (*Ibid.*) The defendant did not mention his *Faretta* motion again in the trial court, and the trial court did not hold a hearing on the motion. (*Ibid.*) The Court of Appeal held that the defendant’s conduct in not calling the trial court’s attention to its failure to address the *Faretta* motion constituted an abandonment of the defendant’s request for a *Faretta* hearing. (*Id.* at p. 62.) In *People v. Skaggs*, *supra*, 44 Cal.App.4th at pages 4-5, the defendant claimed that his statement that “I’d like to go pro per if I could” was an assertion of his right of self-representation under *California v. Faretta*, *supra*, 422 U.S. 806. The Court of Appeal rejected the defendant’s claim, holding that the defendant had not unequivocally asserted his *Faretta* rights, and, even if he had, the defendant’s failure to request a ruling on his *Faretta* motion or to raise the issue again constituted a waiver or abandonment of any right to self-representation. (*People v. Skaggs*, *supra*, 44 Cal.App.4th at pp. 5-8.)

In this case, defendant clearly stated that she was dissatisfied with defense counsel’s performance and no longer wanted him to represent her. Defendant’s *Marsden* motion was unequivocal, and defendant did not fail to press for a ruling on her motion as had the defendants in *People v. Kenner*, *supra*, 223 Cal.App.3d 56 and *People v. Skaggs*, *supra*, 44 Cal.App.4th 1. Respondent cites no authority for the proposition that defendant, having made a *Marsden* motion that the trial court denied, was required to raise the issue again and obtain a second ruling to preserve the issue for appellate review.

C. Proceedings on Remand

Defendant contends that the trial court’s error in summarily denying her *Marsden* motion is prejudicial per se. Respondent contends that we should remand this matter to the trial court to conduct a *Marsden* hearing. If the trial court finds grounds for granting the *Marsden* motion, respondent asserts, it should appoint new defense counsel.

“Originally, *Marsden* error was typically treated as prejudicial per se, since the very nature of the error—failing to allow a defendant to express his reasons for requesting new counsel—precludes meaningful appellate review. [Citations.]” (*People v. Olivencia* (1988) 204 Cal.App.3d 1391, 1400.) Later cases, however, adopted an alternative to outright reversal when “the trial is free of prejudicial error and the appeal prevails on a challenge which establishes only the existence of an unresolved question which may or may not vitiate the judgment” (*Id.* at p. 1401, quoting *People v. Minor* (1980) 104 Cal.App.3d 194, 199; *People v. Lopez* (2008) 168 Cal.App.4th 801, 815.) In such cases, the judgment is reversed and the matter is remanded to the trial court with directions to conduct a *Marsden* hearing at which defendant is given the opportunity to state her reasons for desiring the appointment of new defense counsel. (*People v. Minor, supra*, 104 Cal.App.3d at p. 200; *People v. Lopez, supra*, 168 Cal.App.4th at p. 815; *People v. Olivencia, supra*, 204 Cal.App.3d at p. 1401.) If the trial court finds that the defendant has demonstrated good cause for the appointment of new defense counsel, it is to appoint new defense counsel and set the case for retrial; if the trial court finds that the defendant has not demonstrated good cause, it is to reinstate the judgment. (*People v. Minor, supra*, 104 Cal.App.3d at p. 200; *People v. Lopez, supra*, 168 Cal.App.4th at p. 815; *People v. Olivencia, supra*, 204 Cal.App.3d at pp. 1401-1402.)

Defendant contends that, unlike in *People v. Minor, supra*, 104 Cal.App.3d 194 and *People v. Olivencia, supra*, 204 Cal.App.3d 1391, remanding for a *Marsden* hearing would not adequately safeguard her rights because she clearly asked the trial court to hold a *Marsden* hearing and the trial court’s failure to hold such a hearing was not a mere oversight. Contrary to defendant’s apparent assertion, the trial court in *People v. Minor*, as in this case, summarily denied the defendant’s *Marsden* motion without allowing the defendant to explain his dissatisfaction with defense counsel. (*People v. Minor, supra*, 104 Cal.App.3d at p. 198.) Thus, the trial court’s error in *People v. Minor* was not merely an oversight. In any event, there is no meaningful distinction between *Marsden* error that occurred as the result of what defendant refers to as “oversight” in other cases or *Marsden* error that occurred as in this case.

In this case, defendant challenges her convictions solely on the basis of the trial court's erroneous failure to conduct a full-fledged *Marsden* hearing, and does not identify in the record any other alleged instance of prejudicial error or any instance of alleged ineffective assistance of counsel. In such a case, reversal of the judgment and remand to the trial court for a *Marsden* hearing as set forth above is the appropriate remedy. (*People v. Minor, supra*, 104 Cal.App.3d at p. 200; *People v. Lopez, supra*, 168 Cal.App.4th at p. 815; *People v. Olivencia, supra*, 204 Cal.App.3d at p. 1401.)

DISPOSITION

The judgment is reversed and remanded with directions to the trial court to conduct a *Marsden* motion. If the trial court finds that defendant has demonstrated good cause for the appointment of new defense counsel, it is to appoint new defense counsel and set the case for retrial; if the trial court finds that defendant has not demonstrated good cause for the appointment of new defense counsel, it is to reinstate the judgment.

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MOSK, J.

We concur:

TURNER, P. J.

KRIEGLER, J.